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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE ELIAS SANDOVAL, JR., Defendant and Appellant.	G040140 (Super. Ct. No. 06ZF0122) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Gil Gonzalez and Barry Carlton, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Jose Elias Sandoval, Jr., appeals his conviction for second degree murder and various sentence enhancements. He argues the court erred by failing to instruct the jury on imperfect self-defense or defense of others. Because the facts in the record fail to support any claim that such instructions were warranted, we affirm.

I

FACTS

As of December 2005, Michael Martinez lived near defendant and knew him as Elias. On December 21, defendant invited Martinez to have a drink with him at a bar in San Clemente, and Martinez agreed. Later that evening, they went to the Beach Hut bar. Martinez, defendant and a man named Jason Robinson played ping pong. Robinson and defendant got into a scuffle at one point. Martinez helped to break up the scuffle, and defendant left the bar.

Martinez remained. The bartender heard Robinson wonder aloud if he should also "kick this guy's ass, too," apparently referring to Martinez. Martinez, however, said that he did not really even know defendant, and according to the bartender, the situation appeared to have been defused. Martinez also said he had no problems with anybody in the bar after defendant left.

Robinson went outside for a cigarette at one point. Ryan McBryar saw a man wearing a sweatshirt, ski mask and gloves stab Robinson four times. This was some 20 to 30 minutes after defendant left. Robinson stumbled back into the bar and collapsed. He later died of his injuries. Defendant fled the scene.

The police were notified and given a description of the possible suspect and the name "Elias." A sheriff's deputy saw defendant standing near a pickup truck, leaning inside the passenger area of the cab. The deputy asked defendant if he knew Elias, and defendant answered no, and said that his name was Jose. When asked for identification, defendant gave him a credit card with the name Jose Sandoval. The deputy asked him for

a driver's license, and the one defendant produced listed the holder's name as Jose Elias Sandoval, Jr.

The deputy noticed what appeared to be a blood stain on defendant's pant leg, and he saw defendant lick his finger and wipe at the stain. Later, at the police station, defendant poured water on his pants and rubbed at them. Still later, when another detective was walking defendant across the street to the forensics lab, defendant dropped to his knees and rolled around in a puddle of water. DNA testing on defendant's jeans revealed that the stain was Robinson's blood. Clothes found during a search of defendant's apartment included a sweatshirt, which also had blood matching Robinson's, a ski mask and a glove. Testing later showed that Robinson had a blood-alcohol level of .19, and defendant's blood-alcohol level was .09. Both were either exposed to or used marijuana.

Defendant was charged with murder in violation of Penal Code § 187,[1] and the use of a knife in violation of section 12022, subd. (b)(1). The information also alleged a prior conviction.

At trial, defendant testified to support his defenses of heat of passion and defense of others. Defendant said that when he first arrived at the bar, he noticed a $1 bill with lightning bolts in red ink on it. According to defendant, this was a White supremacist or skinhead symbol representing a stabbing of a person of another race. Defendant asked the bartender if it was a Nazi bar, and she replied it was just a $1 bill.

Defendant started talking to Robinson at the bar. He learned that both he and Robinson had been incarcerated at Corcoran State Prison at the same time. Defendant had the impression that Robinson was a White supremacist, based on his statements and his shaved head. He believed Robinson initially mistook him for white, but when he told Robinson he was Mexican, Robinson thereafter attacked him.

[1] Subsequent statutory references are to the Penal Code.

Defendant testified that he thought Martinez would follow after he left the bar. He thought there might be skinheads in the bar, and Martinez might be attacked. Therefore, he testified, he armed himself, put on the mask and sweatshirt, and returned to the bar, randomly stabbing someone outside. He claimed he had no idea it was Robinson.

At the conclusion of trial, the jury found defendant guilty of second degree murder and found he personally used a deadly weapon. The trial court found the allegations of defendant's prior convictions to be true, and defendant was sentenced to 36 years to life in prison.

II

DISCUSSION

Defendant's only argument on appeal is that the trial court should have instructed the jury on imperfect self-defense and defense of others (Martinez).[2] A trial court need only instruct a jury on a lesser included offense, however, if there is substantial evidence from which a jury could believe the defendant was guilty of the lesser offense. (*People v. Manriquez, supra,* 37 Cal.4th at p. 581.) "A jury instruction need not be given whenever *any* evidence is presented, no matter how weak. [Citation.] Rather, the accused must present 'evidence sufficient to deserve consideration by the jury, i.e., evidence from which a jury composed of reasonable men could have concluded that the particular facts underlying the instruction did exist. [Citation.]'" (*People v. Strozier* (1993) 20 Cal.App.4th 55, 63.) We review the court's decision de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.)

To determine whether there were grounds to support an instruction for imperfect self-defense or defense of others, we examine the nature of imperfect self-

[2] The briefs reveal some inconsistencies as to whether the requested instruction was on a lesser included offense as opposed to a defense theory or an affirmative defense. Case law leaves no doubt that imperfect self-defense and defense of others are lesser included offenses that reduce murder to voluntary manslaughter. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581; *People v. Randle* (2005) 35 Cal.4th 987, 997.)

defense and defense of others. "Self-defense is *perfect* or *imperfect.* For perfect self-defense, one must actually *and* reasonably believe in the necessity of defending oneself from imminent danger of death or great bodily injury. [Citation.] . . . [¶] One acting in imperfect self-defense also actually believes he must defend himself from imminent danger of death or great bodily injury; however, his belief is unreasonable. [Citations.]" (*People v. Randle* (2005) 35 Cal.4th 987, 994.) Like imperfect self-defense, imperfect defense of others requires a belief of imminent harm, though the belief is unreasonable. (*People v. Michaels* (2002) 28 Cal.4th 486, 530.)

"[T]he doctrine is narrow. It requires without exception that the defendant must have had an *actual* belief in the need for self-defense. We also emphasize what should be obvious. Fear of future harm — no matter how great the fear and no matter how great the likelihood of the harm — will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury. '"[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with.*" . . . [¶] This definition of imminence reflects the great value our society places on human life.' [Citation.] Put simply, the trier of fact must find an *actual* fear of an *imminent* harm. Without this finding, imperfect self-defense is no defense." (*In re Christian S.* (1994) 7 Cal.4th 768, 783.)

Thus, the pertinent question is whether there was substantial evidence from which a reasonable jury could believe that defendant had an actual (though unreasonable) belief that either he or Martinez was in imminent danger of death or great bodily injury. That belief must include an actual fear of imminent harm. A review of the evidence leads us to conclude there was not substantial evidence to support such instructions, even if we examine defendant's version of events.

Defendant claims to have been intimidated by Robinson, but he nonetheless confronted him verbally and a scuffle ensued. No one else in the bar joined in the

scuffle. Defendant claims that he "fled the bar believing that Martinez was right behind him." When Martinez failed to arrive, he claims, he feared for Martinez's safety. Rather than promptly reentering the bar, however, he went to his house and gathered supplies, including a knife, gloves and a mask. He did not call the police. He returned to the bar some 20 to 30 minutes later, and saw someone standing outside. Although defendant claimed he did not know who the person was, he stabbed him anyway. He then ran away, ignoring Martinez's welfare.

Even given the most charitable interpretation imaginable, none of defendant's actions demonstrate the presence of an imminent harm that must be instantly addressed. (*In re Christian S., supra,* 7 Cal.4th at p. 783.) When defendant realized that Martinez was not behind him upon leaving the bar, he could have done any number of things that might have demonstrated his immediate concern for his safety — he might have returned to the bar to find him. He might have called the police. Instead, he left to obtain weapons. Defendant was gone 20 to 30 minutes from the time he left the bar to the time he returned. He then attacked someone who might have been "keeping point," but for all defendant knew, might not have been involved in any way. He then fled without ever checking on the welfare of the person he asserted he was defending.

Overall, this is entirely unpersuasive. Based on these facts, no jury could have concluded that defendant acted in imperfect self-defense or defense of others. Even defendant's own version of the facts does not indicate an imminent harm, and without such, "imperfect self-defense is no defense." (*In re Christian S., supra,* 7 Cal.4th at p. 783.)

We therefore find there was no error in the court's refusal to give the requested instructions. The court has no obligation to instruct on theories "'the jury could not reasonably find to exist.'" (*People v. Strozier, supra,* 20 Cal.App.4th at p. 63; see also *People v. Marshall* (1997) 15 Cal.4th 1, 40 [jury instructions based on "'unsupported theories should not be presented to the jury.'"].)

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O’LEARY, ACTING P. J.

FYBEL, J.